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9 **UNITED STATES DISTRICT COURT**  
10 **CALIFORNIA NORTHERN DISTRICT**  
11 **(San Jose Courthouse)**

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16 Scott Johnson,  
17 Plaintiff,  
18 vs.  
19 Fogo De Chao Churrascaria (San  
20 Jose) LLC  
21 Defendant.

CASE NO.: 5:21-cv-02859-BLF  
The Honorable Beth Labson Freeman

**DEFENDANT'S REPLY BRIEF TO  
MOTION FOR SUMMARY  
JUDGMENT**

Hearing Date: 3/10/22  
Hearing Time: 9:00 AM

1           **DEFENDANT'S REPLY BRIEF TO MOTION FOR SUMMARY**  
2   **JUDGMENT**

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4           **Defendant respectfully requests that its Motion for Summary**  
5           **Judgment be granted, or in the alternative a dismissal with prejudice**  
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7           In its second Motion to Dismiss Defendant pointed out that Plaintiff's  
8           argument that he was unable to dine on the Restaurant's patio was implausible  
9           because the patio contained tables that were accessible. Defendant pointed to  
10          its photos of tables at the Restaurant, including some with disabled patrons  
11          sitting in wheelchairs. Plaintiff responded that he had adequately alleged an  
12          ADA cause of action and that it would be improper to consider extrinsic  
13          evidence on a motion to dismiss. Plaintiff alleged that "one problem" he  
14          encountered was "the lack of sufficient knee or toe clearance" on the patio  
15          tables because of their "pedestal style" supports, which made it difficult for  
16          Plaintiff to pull under the table. ¶ 12. Now that the time has come for Plaintiff  
17          to provide the evidence to support this allegation, none seems forthcoming.  
18          Plaintiff has failed to Oppose Defendant's Motion for Summary Judgment.  
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24          A failure to oppose a proper motion for summary judgment can result in  
25          the dismissal with prejudice. A motion for summary judgment under Rule 56  
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1 of the Federal Rules of Civil Procedure will, if granted, ends Plaintiff's case.  
2 *Rand v. Rowland*, 154 F.3d 952, 963-64 (9th Cir. 1998). A principal purpose  
3 of the summary judgment procedure is to identify and dispose of factually  
4 supported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct.  
5 2548, 91 L. Ed. 2d 265 (1986). In order to withstand a motion for summary  
6 judgment, the opposing party must set forth specific facts showing that there  
7 is a genuine issue of material fact in dispute. Fed. R. Civ. P. 56(e). A dispute  
8 about a material fact is genuine "if the evidence is such that a reasonable jury  
9 could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby,*  
10 *Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In the  
11 absence of such facts, "the moving party is entitled to a judgment as a matter  
12 of law." *Celotex Corp.*, 477 U.S. at 323. Since Plaintiff has not submitted his  
13 own evidence in opposition, summary judgment should be entered against  
14 him.  
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21 Plaintiff's failure to oppose the motion for summary judgment also  
22 constitutes a waiver or abandonment of the issues raised in Defendant's  
23 motion. *Qureshi v. Countrywide Home Loans, Inc.*, No. 09-4198, 2010 U.S.  
24 Dist. LEXIS 21843, 2010 WL 841669, at \*6 n. 2 (N.D. Cal. Mar. 10, 2010)  
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1 (deeming plaintiff's failure to address, in opposition brief, claims challenged  
2 in a motion to dismiss, an "abandonment of those claims") (citing Jenkins v.  
3 Cnty. of Riverside, 398 F.3d 1093, 1095 n. 4 (9th Cir. 2005)); Sportscare of  
4 America, P.C. v. Multiplan, Inc., No. 2:10-4414, 2011 U.S. Dist. LEXIS  
5 14253, 2011 WL 589955, at \*1 (D.N.J. Feb. 10, 2011) ("In most  
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7 circumstances, failure to respond in an opposition brief to an argument put  
8 forward in an opening brief constitutes waiver or abandonment in regard to  
9 the uncontested issue.").

12 As an alternative to the Court granting Summary Judgment in favor of  
13 Defendant, Defendant requests that this case be dismissed for lack of  
14 prosecution pursuant to Rule 41(b) of the Federal Rules of Civil Procedure,  
15 "For failure of the plaintiff to prosecute or to comply with these rules or any  
16 order of court, a defendant may move for dismissal of an action or of any  
17 claim against the defendant. Unless the court in its order for dismissal  
18 otherwise specifies, a dismissal under this subdivision ... operates as an  
19 adjudication upon the merits." The factors to be weighed in determining  
20 whether to dismiss for lack of prosecution are identical to the factors to be  
21 considered when deciding whether to dismiss for failure to obey court orders.  
22 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992). Those factors are:  
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1 (1) the public interest in expeditious resolution of litigation; (2) the court's  
2 need to manage its docket; (3) the risk of prejudice to the defendants; (4) the  
3 public policy favoring disposition on the merits; and (5) the availability of  
4 less drastic sanctions. *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988)  
5 (per curiam).  
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8 The public interest in expeditious resolution of litigation, the court's need  
9 to manage its docket, and the risk of prejudice to the defendants all support  
10 the sanction of dismissal. As to the public policy favoring disposition on the  
11 merits, Plaintiff's failure to put forward the evidence is inexcusable. Plaintiff  
12 is a seasoned serial filer, having filed literally thousands (nearly 5,000  
13 lawsuits). He (and his attorneys, Potter Handy) have mastered the art of  
14 monetizing the ADA. But the litigation wheels seem to grind to a halt when  
15 Plaintiff is challenged to support his claim with evidence. And it's not as if  
16 Plaintiff was caught unawares. The identical arguments were made in motions  
17 to dismiss, months ago, which the Court did not convert into a motion for  
18 summary judgment. Clearly, Plaintiff has had plenty of time to gather his  
19 evidence. And that justifies a recommendation of dismissal. No lesser  
20 sanction would serve any purpose.  
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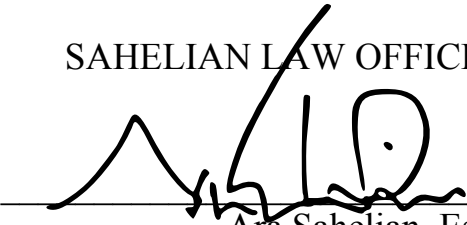
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Defendant respectfully requests that its motion for summary judgment be granted or, in the alternative, that this action dismissed with prejudice.

Respectfully submitted:

Date: 11/23/2021

SAHELIAN LAW OFFICES

  
Ara Sahelian, Esq.